85-381

Supreme Court, U.S.
FILED
SEP 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

RAMAN P. PATEL,

Petitioner,

vs.

FLYING TIGER LINE, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

David T. Lopez
David T. Lopez & Assoc.
7660 Woodway - Suite 250
Houston, Texas 77063
(713) 266-5536

Attorneys for Petitioner

QUESTION PRESENTED

In exercising its discretion on a motion to dismiss as a discovery sanction, must a trial court demonstrate consideration of a party's ability to comply and whether the asserted default has prejudiced the complaining party?

PARTIES TO THE PROCEEDING

Raman P. Patel - Petitioner

The Flying Tiger Line, Inc.

- Respondent

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION OF THIS COURT	1
PROVISIONS OF APPLICABLE RULE	1
REASONS FOR GRANTING THE WRIT	5
CONCLUSION AND PRAYER	10
APPENDIX	A-1

TABLE OF AUTHORITIES

	Page
Cases	
Hammond Packing Company vs. Arkansas, 212 U.S. 322, 347, 53 L.Ed.2d 530 (1909).....	7
Societe Internationale vs. Rogers, 357 U.S. 197, 212, 2 L.Ed.2d 1255 (1958).....	8
Rules	
Rule 37(d), Fed. R. Civ. P.....	1
Statutes	
28 U.S.C. § 1254(1).....	1

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not reported. It is reproduced in the Appendix, p. A-2 et seq.

JURISDICTION OF THIS COURT

The opinion of the United States Court of Appeals for the Ninth Circuit was rendered May 13, 1985. A petition for rehearing filed by the Petitioner was denied by the Court of Appeals by order of June 11, 1985, which is reproduced in the Appendix, p. A-1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

PROVISIONS OF APPLICABLE RULE

Rule 37(d), Federal Rules of Civil Procedure, provides that the Court may impose sanctions, including dismissal,

upon a party's failure to timely respond to discovery.

Petitioner, Mr. Patel, filed suit against the Respondent, Flying Tiger, for employment discrimination after being discharged as a pilot.

During the course of his lawsuit, he was employed by another airline and spent considerable time away from his residence on flying assignments throughout the world. His assignments were irregular and imposed upon short notice.

The lawsuit was filed in Los Angeles. Mr. Patel resided in the State of Washington. His counsel resides and maintains his office in Houston, Texas.

During the course of Mr. Patel's deposition, he was required to report for flight assignment on short notice and the deposition was continued by agreement. Because of other assignments, it was

difficult to reschedule the deposition, and on December 15, 1982, Flying Tiger moved to dismiss. It was only after the motion to dismiss was filed that Mr. Patel was located through another pilot while on a stopover in Paris.

The trial court, at a hearing on the motion to dismiss, refused to consider the special circumstances stating that Mr. Patel had filed the lawsuit and it was his responsibility to comply with discovery. The judge stated that although he was inclined to dismiss the action, he would not do so at that time, but that if there were any other deviation from procedures "out the case goes."

Thereafter, Flying Tiger completed the deposition and filed interrogatories seeking the identity of witnesses and exhibits for trial.

Mr. Patel's counsel provided the information, but advised counsel for Flying Tiger that Mr. Patel could not file formal signed responses to the interrogatories until he returned from a flying assignment.

Flying Tiger, aware that Mr. Patel's counsel was on vacation, then filed a second motion to dismiss.

Plaintiff's counsel was precluded from appearing in Los Angeles for the hearing because of hurricane Alicia, which interrupted an ongoing trial in Houston, damaged counsel's office and residence, and precluded telephone contact with court personnel to seek postponement.

Shortly before the hearing, Mr. Patel's counsel was able to reach Flying Tiger's counsel, and Flying Tiger's counsel made the court aware of the

problem and a request for continuance.

The Court denied continuance and dismissed the case.

REASONS FOR GRANTING THE WRIT

As an active civil rights practitioner, the undersigned is well aware that United States district courts are faced with burgeoning calendars and virtually impossible time demands. With extreme concern, the undersigned has noted the willingness to dismiss lawsuits without due regard for the circumstances or the onerous consequences on affected parties.

The press of cases may cause a clerk to fail to give notice of a docket call, but if counsel does not appear, the case is dismissed without inquiry.

Courts rely on bromides rather than analysis. If a Plaintiff cannot timely comply with some procedural requirement,

then his case can be summarily disposed of. After all, states the Court, the Plaintiff brought the lawsuit. The lawsuit is the Plaintiff's responsibility.

The United States Supreme Court itself is overwhelmed with an increasing case load. It is not suggested by this petition that this Court should assume a supervisory role over the exercise by judges in the district courts of the broad discretion necessary to control trial court calendars.

As the ultimate depository of this nation's notions of fairness and justice, however, this Court must periodically consider the problems that court administration imposes not only upon the courts, but upon the litigants.

Where, as here, there is a clear abuse, a declaration by this Court of specific standards is essential to

prevent injustice.

More than 75 years ago, this Court, in Hammond Packing Company vs. Arkansas, 212 U.S. 322, 347, 53 L. Ed. 530 (1909), declared that dismissal in the face of "any reasonable showing of an inability to comply" constitutes an abuse of discretion.

Here, the showing is even greater.

Challenging the loss of his job as the result of racial discrimination, Mr. Patel was required to accept employment requiring flights throughout the world upon short notice and an irregular schedule.

Despite the problem and the necessity to make repeated trips from Seattle to Los Angeles to complete a deposition extending for numerous hours, Mr. Patel fully complied with all discovery requests.

Even though the pretrial procedure includes the preparation of an order listing all witnesses and exhibits, Flying Tiger filed interrogatories requesting the same information. The information was provided, but Mr. Patel was on a trip and could not formally sign a response to interrogatories.

There was a clear showing of inability to comply with the technical requirements of discovery, but there was no failure to comply with the discovery itself, nor was there any demonstrated prejudice to Flying Tiger.

This Court also has declared that such mere technical default, absent willfulness, bad faith, or other demonstrated fault, is insufficient to warrant Rule 37 dismissal. Societe Internationale vs. Rogers, 357 U.S. 197, 212, 2 L. Ed. 2d 1255 (1958).

As a crowning blow, Mr. Patel was not even able to make an argument to the trial court because of a natural disaster which certainly could not be attributed to Mr. Patel. (The Court of Appeals incorrectly characterizes Mr. Patel's contention as "that a hurricane prevented his attorney from complying with discovery and court rules," Appendix, p. A-7. Mr. Patel argued that he had a procedural due process right to argue against dismissal to the trial court.) The record clearly demonstrates that not only was Mr. Patel's counsel precluded from being present, but the hurricane, coinciding with a telephone workers' strike, made it impossible for counsel to reach court personnel to request a continuance.

This is an individual case involving one man's life and career. The issue is one, however, of more than passing

consequence. Public respect for the law and its institutions is the essence of our judicial system. That system cannot expect, nor will it receive, respect and support from all citizens if it can countenance arbitrary rejection of an individual it was simply too busy to hear.

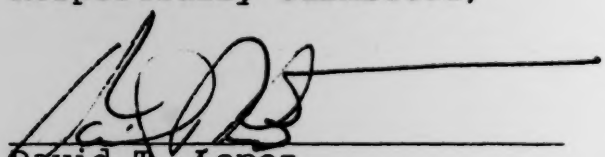
Under clearly and long-standing principles the action of dismissal cannot be allowed to stand. The action of this Court in granting certiorari and reversing, as it should, will have a salutary effect on the federal courts of the nation by providing a necessary and timely reminder on the management of a pervasive problem.

CONCLUSION AND PRAYER

Summary dismissals, motivated more by the press of time demands than by just consideration of the circumstances,

constitute a general problem which seriously affects the administration of justice. This case provides a clear-cut example. The Court should grant certiorari to provide clear and explicit guidance on the necessity to consider, on a motion to dismiss, the underlying circumstances and the specific effect on the litigation. The action of the trial court, clearly in violation of long-standing precedent, should be reversed.

Respectfully submitted,



David T. Lopez
Attorney for Petitioner
David T. Lopez & Associates
7660 Woodway - Suite 250
Houston, Texas 77063
(713) 266-5536

DTL/mb
9/05/85

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CA No. 83-6289
DC No. CV 82-310-WPG
(Central California)

CA No. 83-6527
DC No. CV 82-0310-RG

ORDER

RAMAN P. PATEL,

Plaintiff-Appellant,

vs.

FLYING TIGER LINE, INC.,

Defendant-Appellee.

Before: BARNES, FARRIS, and CANBY,

Circuit Judges.

Appellant's petition for rehearing is denied.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CA No. 83-6289
DC No. CV 82-310-WPG

CA No. 83-6528
DC No. CV 82-0310-RG

MEMORANDUM*

RAMAN P. PATEL,

Plaintiff-Appellant,

vs.

FLYING TIGER LINE, INC., a corporation,

Defendant-Appellee.

Appeal from
the United States District Court
for the Central District of California
William P. Gray, District Judge, Presiding
Richard A. Gadbois, Jr., District Judge, Presiding
Submitted January 28, 1985

Before: BARNES, FARRIS, and CANBY,

Circuit Judges.

The panel unanimously agrees that this case may be submitted without oral argument.

Raman Patel appeals the district court's order dismissing his employment discrimination claim with prejudice and imposing sanctions of $500 for his failure to comply with discovery rules and a court order. Patel also appeals the denial of his motion for a new trial or for relief from judgment. He contends

---

*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit.

that the sanctions were imposed solely for punishment and without consideration of Patel's ability to comply with discovery, and that the sanctions were unrelated to the issues in discovery. We affirm the district court's order.

The district court's Fed. R. Civ. P. 37 order is reviewed for an abuse of discretion. Wyle v. R.J. Reynolds Industries, Inc., 709 F.2d 585, 589 (9th Cir. 1983). Unless there is a firm and definite conviction that the trial court committed a clear error of judgment, a Rule 37 dismissal should be affirmed. Id. The trial court's imposition of Rule 37 sanctions must be both just and specifically related to the discovery claim at issue. Wyle v. R.J. Reynolds, 709 F.2d at 591.

These requirements are met. Patel's case was dismissed after fourteen months

of delays and numerous failures to comply with discovery. Patel disregarded discovery requests, ignored court filing deadlines, failed to request continuances, and failed to appear at a hearing. Moreover, the court specifically warned Patel that continued disregard of his obligations would result in dismissal of his suit. The court's dismissal of the suit was warranted as a means of deterring Patel and other litigants from such discovery breaches. See National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam); R.J. Reynolds, 709 F.2d at 589.

Further, the dismissal order was related to the claims at issue in discovery. By initiating the suit, Patel put various claims in issue, but information relevant to those claims was not provided in timely fashion. This preju-

diced Flying Tiger's ability to defend the lawsuit and impermissibly increased its legal expenses in obtaining the information. See Wyle v. R.J. Reynolds, 709 F.2d at 591; G-K Properties v. Redevelopment Agency, 577 F.2d 645, 647 (9th Cir. 1978). Although Patel made a last-minute tender of some information, that effort did nothing to cure the problems created by his earlier failures to comply with discovery. See G-K Properties, 577 F.2d at 647. There was no error in the imposition of the sanction for Patel's failure to provide discovery on material issues.

Patel's repeated failure to comply with discovery requests and court rules did not result from circumstances beyond his control. Although his job may have taken Patel out of the country for extended periods of time, he was not

prevented from contacting his counsel periodically. Patel's contention that a hurricane prevented his attorney from complying with discovery and court rules is without merit. That hurricane struck two months after discovery responses were due and a month after the motion to dismiss was filed. Patel's failures evidenced his own wilfulness, bad faith, or fault, and the sanction was therefore appropriate. See Sigliano v. Mendoza, 642 F.2d 309, 310 (9th Cir. 1981). Moreover, because Patel's repeated failures to comply with discovery were wilful and inexcusable, the trial court did not abuse its discretion by awarding Flying Tiger $500 to cover the cost of the attorney fees in preparing the motion to dismiss. See United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365, 1370-71 (9th Cir. 1980).

We find no error in the district court's denial of Patel's motion for new trial. None of the arguments presented in the motion warranted reassessment by the district court of its decision. As noted above, the plaintiff's belated, incomplete tender of information does not save him from sanctions. The scheduling and weather problems that prevented plaintiff's counsel from responding to the motion to dismiss should have been raised before the hearing date in a motion to continue, not in a motion for new trial. The district court also properly denied Patel's Rule 60 (b) motion. Smith v. Lujan, 588 F.2d 1304, 1307 (9th Cir. 1979).

Affirmed.

ROBERT A. SIEGEL
T. WARREN JACKSON
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, California 90071-2899
(213) 669-6000

Attorneys for Defendant
The Flying Tiger Line Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RAMAN P. PATEL,	)No.CV 82 0310 RG
	)
Plaintiff,	) (PROPOSED)
	) ORDER DISMISSING
v.	) COMPLAINT AND
	) GRANTING SANC-
FLYING TIGER LINE, INC.)	TIONS, AND JUDG-
a Corporation,	) MENT
	)
Defendant.	)
	)

This matter came on regularly for hearing on August 22, 1983, before The Honorable Richard A. Gadbois, Jr., District Judge, presiding, defendant, The Flying Tiger Line Inc. ("Flying Tiger"), having moved pursuant to Rule 37 of the Federal Rules of Civil Procedure for an

order dismissing the complaint and for other sanctions because of plaintiff's failure to answer interrogatories and requests for production of documents in violation of discovery rules and the Court's previous discovery order. The Court having considered the pleadings, files and records in this action, the documents and memorandum of points and authorities submitted in connection with said motion and the oral argument on the motion, now finds, as set forth in the Findings of Fact and Conclusions of Law filed herewith, that plaintiff has repeatedly and wilfully failed to answer Flying Tiger's discovery, to comply with the Local Rules of this Court and its previous discovery order, and further finds that Flying Tiger is entitled to dismissal of the complaint and sanctions against plaintiff as a matter of law.

IT IS HEREBY ORDERED that Flying Tiger's motion to dismiss and for sanctions is granted; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that this action be dismissed in its entirety with prejudice and that Flying Tiger be awarded sanctions against plaintiff and his counsel in the amount of $500.00, payable to O'Melveny & Myers, to cover its reasonable attorneys' fees in connection with not only the filing of the instant motion but also its previous motion to dismiss.

DATED _____, 1983.

_____
RICHARD A. GADBOIS, JR.
United States District
Court Judge

ROBERT A. SIEGEL
T. WARREN JACKSON
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, California 90071-2899
(213) 669-6000

Attorneys for Defendant
The Flying Tiger Line Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RAMAN P. PATEL, Plaintiff, v. FLYING TIGER LINE, INC., a corporation, Defendant.	No.CV 82 0310 RG (PROPOSED) FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on regularly for hearing on August 22, 1983 before The Honorable Richard A. Gadbois, Jr., District Judge, presiding, defendant, The Flying Tiger Line Inc. ("Flying Tiger"), having moved pursuant to Rule 37 of the Federal Rules of Civil Procedure for an

order dismissing the complaint and for other sanctions because of plaintiff's failure to answer interrogatories and requests for production of documents in violation of both discovery rules and this Court's previous discovery order. The Court has considered the pleadings, files and records in the instant case, the memorandum of points and authorities with supporting declaration and exhibits submitted in support of said motion, and the oral argument presented at the hearing of this motion; and the Court having fully considered the law and the facts disclosed by this record, now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff, a former second

officer pilot for Flying Tiger, filed this action on or about January 22, 1982, alleging that his failure to pass upgrade training to first officer and his resultant termination by Flying Tiger were discriminatory acts in violation of federal and state civil rights statutes, the California Constitution, and the terms of his collective bargaining agreement.

2. On December 15, 1982, Flying Tiger brought a motion under Rule 37(d) of the Federal Rules of Civil Procedure to dismiss the complaint and for sanctions because of plaintiff's failure to appear at his noticed deposition and to allow its completion, and his failure to respond to Flying Tiger's first set of interrogatories. After a hearing on January 10, 1983, this Court issued a discovery order dated January 26, 1983, denying

Flying Tiger's motion to dismiss and reserving its ruling on the request for sanctions for a later determination based upon plaintiff's future conduct. The order also stated that "[a]ny future failure by plaintiff to comply with discovery rules and/or the Local Rules of the Central District of California shall subject plaintiff to sanctions, including dismissal of the complaint." Finally, this Court ordered: (1) the resumption and completion of plaintiff's deposition and plaintiff to serve responses to Flying Tiger's first set of interrogatories; (2) all discovery to be completed by July 29, 1983; and (3) plaintiff to tender immediately eighty dollars payable to O'Melveny & Myers as reimbursement for a deposition reporter's cancellation fee.

3. Thereafter, Flying Tiger

unsuccessfully attempted to engage in additional discovery. Thus, on February 25, 1983, Flying Tiger served on plaintiff a first request for production of documents identified in plaintiff's deposition and in his responses to its first set of interrogatories. Responses to this request were not received by the March 30, 1983 due date, although plaintiff neither sought nor obtained an extension of time to answer this discovery. Almost a month and one-half after the due date, on May 9, 1983 Flying Tiger's counsel sent a letter to plaintiff's counsel (David T. Lopez, in Houston, Texas and William H. Steiner in Los Angeles, California) requesting production of the documents. This letter also constituted a request to meet to eliminate the necessity for filing any discovery motion pursuant to Rule 3.15.1 of the Local Rules

of the District of California. Plaintiff's counsel did not respond to the May 9, 1983 letter. Later in May, Flying Tiger's counsel telephoned Mr. Lopez in order to resolve this failure to answer discovery. During the conversation, Flying Tiger's counsel was advised that the requested documents would be produced before the end of May. By the date of the filing of the instant motion on July 25, 1983, the documents had not been produced.

4. On May 16, 1983 Flying Tiger served on plaintiff a second set of interrogatories and second request for production of documents. This discovery requested, inter alia, the identification of persons with knowledge of plaintiff's complaint allegations relevant documents, and his expert witnesses, and the

production of identified documents. This discovery request was not answered by the June 20, 1983 response date, and, again, plaintiff neither sought nor obtained an extension of time to answer. Therefore, on July 5, 1983 Flying Tiger's counsel unsuccessfully attempted to reach Mr. Lopez by telephone in order to obtain the requested discovery. Counsel was informed that Mr. Lopez was unavailable to talk on the phone and that he would return the call. However, the call was not returned.

5. On July 8, 1983 Flying Tiger's counsel sent a letter to plaintiff's counsel requesting answers to both Flying Tiger's first request for production of documents and its second set of interrogatories and second request for production of documents, and advising that if

answers were not received in the offices of Flying Tiger's counsel by July 15, 1983, Flying Tiger would file a discovery motion. That letter also contained a request to meet to eliminate the necessity for filing any discovery motion pursuant to Local Rule 3.15.1. A copy of that local rule was enclosed with the letter.

6. On July 15, 1983 Flying Tiger's counsel received a telephone call from Mr. Lopez, who indicated that answers to Flying Tiger's outstanding discovery, including the requested documents, would be delivered to Flying Tiger's counsel's office by July 18, 1983. This conversation was confirmed in a letter dated July 18, 1983, from Flying Tiger's counsel to Mr. Lopez. However, Flying Tiger had not received answers to its outstanding discovery prior to the filing of the instant

motion.

7. On July 25, 1983 Flying Tiger filed the instant motion to dismiss and for sanctions. Plaintiff did not file an opposition memorandum of points and authorities, as required by Local Rule 3.6.1. At the August 22, 1983 hearing on the motion, neither of plaintiff's counsel appeared, as required by Local Rule 3.10. Rather, Flying Tiger's counsel represented to this Court that he had talked to Mr. Lopez on the telephone that morning, and that Mr. Lopez had indicated that he was in trial and could not make the hearing and had been unable to contact Mr. Steiner to have him appear at the hearing. In addition, Flying Tiger's counsel stated that Mr. Lopez had requested a one week continuance of the hearing. This untimely request for a

continuance was denied by this Court.

8. Plaintiff has repeatedly and wilfully failed to answer interrogatories and requests for documents, and to comply with the Local Rules of this Court and its discovery order.

9. Flying Tiger has incurred expenses, including attorneys' fees, by not only the filing of the instant motion but also its previous discovery motion where the question of sanctions was reserved for a later determination.

10. Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

11. Any Conclusion of Law hereinafter recited which should be deemed a

Finding of Fact is found to be true in all respects and is incorporated herein by reference.

CONCLUSIONS OF LAW

1. The Court concludes in all respects as set forth in the foregoing Findings of Fact that said findings have been made upon issues which are determinative in this action.

2. District courts have the discretion to order any of the available sanctions, including dismissal of the complaint, for the failure of a plaintiff to comply with discovery rules and orders. See Fed. R. Civ. P. 37; National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 (1976)(per curiam); Sigliano v. Mendoza, 642 F.2d 309, 310

(9th Cir. 1981); United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 365, 369 (9th Cir. 1980); G-K Properties v. Redevelopment Agency, 577 F.2d 645, 647-48 (9th Cir. 1978). This Court concludes that plaintiff has repeatedly and wilfully failed to answer interrogatories and requeests for documents, and has disregarded discovery rules, the Local Rules of this Court, and its discovery order. Accordingly, this Court exercises its discretion to dismiss the complaint. Dismissal is particularly warranted here for two reasons. First, because lesser sanctions were not a deterrent to this plaintiff. Second, because Flying Tiger has been impermissibly prejudiced in its efforts to engage in discovery and to prepare for trial.

3. Plaintiff's failure to comply

with discovery rules, the Local Rules of this Court and its discovery order was not substantially justified, therefore, sanctions in the amount of $500 against plaintiff and his counsel are imposed. See Fed. R. Civ. P. 37(d).

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED _____, 1983.

RICHARD A. GADBOIS, JR.
United States District
Court Judge

Supreme Court, U.S.
FILED
OCT 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-381 (2)

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

RAMAN P. PATEL,

Petitioner,

vs.

FLYING TIGER LINE, INC.,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

David J. Hamilton
O'Melveny & Myers
400 South Hope Street
Los Angeles, California 90071
(213) 669-6000

Attorneys for Respondent

15 pp

BEST AVAILABLE COPY

NO. 85-381

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

RAMAN P. PATEL,

Petitioner,

vs.

FLYING TIGER LINE, INC.,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

David J. Hamilton
O'Melveny & Myers
400 South Hope Street
Los Angeles, California 90071
(213) 669-6000

Attorneys for Respondent

QUESTION PRESENTED FOR REVIEW

Whether the district court abused its discretion when it dismissed petitioner's complaint under Rule 37 of the Federal Rules of Civil Procedure, as the sanction for petitioner's failure to answer interrogatories and requests for production in violation of discovery rules and the district court's previous discovery order, failure to meet court filing deadlines, failure to request timely continuances and failure to appear at a hearing.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	v
PROVISIONS OF APPLICABLE RULES	v
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	10
ARGUMENT	11
I. REVIEW ON WRIT OF CERTIORARI IS INAPPROPRIATE	11
II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING PATEL'S COMPLAINT	12
A. The Order of Dismissal was Justified	14
B. Dismissal of the Complaint Did Not Violate Due Process	21
CONCLUSION	31

TABLE OF AUTHORITIES

Cases	Page
Anderson v. Air West, Inc., 542 F.2d 522 (9th Cir. 1976)	13
Bennett v. Federal Deposit Ins. Corp, 396 F.2d 909 (9th Cir. 1968)	22
Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062 (2nd Cir. 1979)	16
G-K Properties v. Redevelopment Agency of San Jose, 577 F.2d 645 (9th Cir. 1978)	29
In Re Josephson, 218 F.2d 174 (1st Cir. 1954)	13
In Re Visioneering Construction, 661 F.2d 119 (9th Cir. 1981)	22
Link v. Wabash Railroad Co., 370 U.S. 626, reh. den. 371 U.S. 873 (1962)	24
National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, reh. den., 429 U.S. 874 (1976).	12,15 17,19
Sigliano v. Mendoza, 642 F.2d 309 (9th Cir. 1981)	13,15 16,17

Cases	Page
Smith v. Stone, 308 F.2d 15 (9th Cir. 1962)	22,27
Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958)	23
United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365 (9th Cir. 1980)	15
Wyle v. R. J. Reynolds Industries, Inc. 709 F.2d 585 (9th Cir. 1983)	13,17 29

Rules	
Federal Rule of Civil Procedure 6	26
Federal Rule of Civil Procedure 37	3,8 14,15
Federal Rule of Civil Procedure 59	22
Federal Rule of Civil Procedure 60	21,22 23,30
Local Rule of the Central District of California 7.6	26
Supreme Court Rule 17	11

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Ninth Circuit affirming the district court dismissal of the complaint is reproduced in the appendix of Petitioner's petition at A-2 through 8. The order of the United States District Court for the Central District of California dismissing the complaint and granting sanctions and judgment together with the district court findings of fact and conclusions of law are included in petitioner's brief at A-9 through 24.

PROVISIONS OF APPLICABLE RULES

This case arises under Rule 37(d) of the Federal Rules of Civil Procedure, which states in pertinent part:

> If a party . . . fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after

proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others, it may take any action authorized under Paragraphs (A), (B), and (C) of Subdivision (b)(2) of this rule.

Rule 37(b)(2)(C) provides that the court may issue an order "[d]ismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party. . . ."

STATEMENT OF THE CASE

The underlying action in this matter was filed on January 22, 1982. Petitioner Raman P. Patel (hereinafter "Patel") alleged that his failure to pass upgrade training to first officer and resultant termination by respondent The Flying Tiger Line, Inc. (hereinafter "Flying Tiger")[1/] were discriminatory acts in violation of federal and state civil rights statutes, the California Constitution and the terms of his collective bargaining agreement. See Petition at A-14.

The district court's dismissal arises from a protracted discovery phase of the case in which Patel refused to comply in almost all respects. The record demonstrates that despite an order extending Patel's time to answer and agreed to

---

1/ A listing of respondent's parent, subsidiaries and affiliates required by Supreme Court Rule 28.1 is included as an appendix hereto.

by Flying Tiger, Patel had failed to respond in any fashion to Flying Tiger's first set of interrogatories. Id.

Flying Tiger's attempts to depose Patel had been thwarted at every turn. At the first session, set for July 9, 1982, Patel and his counsel appeared approximately five hours late and requested that the deposition session go no more than about three hours. At the next session (July 12, 1982), the deposition was necessarily shortened because Patel had to leave to catch an airplane flight. At the third session, set at Patel's convenience, the deposition again was disrupted because of Patel's travel schedule.

Patel's local counsel was to inform Flying Tiger when Patel would next be available for completion of his deposition. After two months without contact by local counsel, Flying Tiger's counsel attempted to reach Patel's lead counsel

(in Texas) by correspondence and telephone to continue the deposition, without success.

Eventually, after renoticing the deposition to November 19, 1982, and confirming with Patel's counsel that both he and Patel would be in attendance, and having retained the court reporter for the deposition, Flying Tiger's counsel discovered for the first time on the morning of the deposition, that neither Patel nor has counsel would be in attendance. Petition at A-14.

Flying Tiger filed a motion to dismiss on December 15, 1983, based on Patel's refusal to cooperate in discovery efforts, pursuant to Rule 37(d) of the Federal Rules of Civil Procedure. Id.

The district court was appropriately annoyed at Patel's obstruction of Flying Tiger's discovery efforts, and at Patel's belated filing of

opposition to the motion on the morning of the hearing. Although the court denied Flying Tiger's initial motion to dismiss, it did so reluctantly, ordered resumption of Patel's deposition, set a discovery cutoff of July 29, 1983, ordered that Patel pay Flying Tiger's counsel reimbursement for the court reporter's fees and reserved imposition of other sanctions based on Patel's future conduct in the litigation. The court's warning was emphatic: any further misconduct by Patel or counsel regarding the court's order, discovery rules or local rules, would result in imposition of sanctions, including dismissal. Petition at A-15.

Notwithstanding the district court's discovery order, Patel failed to respond to Flying Tiger's subsequent discovery requests. On February 25, 1983, Flying Tiger served on Patel a first request for the production of documents identified in Patel's deposition and in his responses to Flying Tiger's first set of

interrogatories. Responses to this request were not received by the March 30, 1983, due date. Almost a month and a half after the due date, on May 9, 1983, Flying Tiger's counsel sent a letter to Patel's counsel requesting production of the documents. This letter also advised that Flying Tiger intended to file a motion to compel if the requested documents were not produced. It also constituted a request to meet to eliminate the necessity for such a discovery motion pursuant to the Local Rules of the Central District of California. Petition at A-15-17.

Patel's counsel did not respond to the May 9, 1983, letter. Consequently, Flying Tiger's counsel telephoned Patel's counsel in order to resolve this failure to answer discovery. During the conversation, Flying Tiger's counsel was advised that Patel had been out of the country, but had recently returned, and that the requested documents would be produced before the end of May 1983. (These documents had still

not been produced by the filing of Flying Tiger's motion to dismiss on July 25, 1983.) Petition at A-17.

On May 16, 1983, Flying Tiger served on Patel a second set of interrogatories and second request for production of documents. This discovery requested, inter alia, the identification of persons with knowledge of Patel's allegations, any expert witnesses and supporting documents, and the production of identified documents. After waiting more than a month after the June 20, 1983, response date, on July 5, 1983, Flying Tiger's counsel unsuccessfully attempted to reach Patel's counsel in order to obtain the requested discovery. Flying Tiger's counsel was informed that Patel's counsel was unavailable to talk on the telephone and that he would return the call. The call was not returned. Petition at A-16-17.

On July 8, 1983, faced with impending discovery cutoff, Flying Tiger's counsel sent a letter to Patel's counsel requesting answers to both Flying Tiger's first request for production of documents and its second set of interrogatories and second request for production of documents, and advised him that if answers were not received by Flying Tiger's counsel by July 15, 1983, Flying Tiger would file appropriate motions. The July 8, 1983, letter also contained a request to meet to eliminate the necessity for filing any discovery motion pursuant to the Local Rules. A copy of the Local Rule was enclosed in the letter. Petition at A-18-19.

On July 15, 1983, Flying Tiger's counsel received a telephone call from Patel's counsel, who indicated that answers to Flying Tiger's outstanding discovery, including the requested documents, would be delivered to Flying Tiger's counsel's office by July 18, 1983. This conversation was confirmed in a letter from Flying

Tiger's counsel to Patel's counsel dated July 18, 1983. On July 25, 1985, Flying Tiger had still not received answers to its outstanding discovery and it proceeded to file a second motion to dismiss under Rule 37(d). Petition at A-20-21.

Patel filed no opposition to Flying Tiger's motion. At the August 22, 1983, hearing on the motion, neither Patel nor his attorneys appeared, and Flying Tiger's counsel accurately represented to the court based on his telephone conversation with Patel's lead counsel, Mr. Lopez, the reasons why neither of Patel's counsel would be appearing. Flying Tiger's counsel also communicated Patel's request for a continuance, which the district court denied. Flying Tiger's motion to dismiss was granted, and on August 25, 1983, Flying Tiger lodged with the district court and served on Patel, Proposed Findings of Fact and Conclusions of Law, to which Patel did not file objections and which were signed by the district court as submitted.

Judgment of dismissal was entered August 29, 1983, and sanctions against Patel and his counsel for $500 were awarded to Flying Tiger. Petition at A-20-21.

Patel filed a motion for new trial or relief from judgment in September 1983, along with his notice of appeal from dismissal of the complaint. The parties stipulated to submission of the motion without hearing. The district court denied Patel's motion for new trial or relief from judgment. Judgment was entered November 17, 1983 from which Patel appealed on December 15, 1983.

The Court of Appeals for the Ninth Circuit rendered an opinion on May 13, 1985, holding, inter alia, that the district court had not abused its discretion and that dismissal was an appropriate sanction in light of Patel's behavior. Petition at A-2-8.

SUMMARY OF ARGUMENT

Patel has not pointed to any facts which would indicate that either the district court or the Ninth Circuit departed from the usual course of judicial proceedings. Thus, the dismissal of Patel's complaint under Rule 37 was appropriate in light of Patel's persistent refusal to comply with the Federal Rules of Civil Procedure, the Local Rules of the Central District of California, and the district court's discovery orders and his failure to offer any valid justification for his actions. Therefore, review on writ of certiorari is inappropriate.

ARGUMENT

I. REVIEW ON WRIT OF CERTIORARI IS INAPPROPRIATE.

Rule 17 of the Rules of the Supreme Court provide that the Court will grant review on writ of certiorari only "when there are special and import reasons therefor." The rule enumerates several examples of questions which will be considered. The only example even remotely applicable to the present situation is found in Rule 17.1(a) which states the Court will grant review:

> When a federal court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

In the present case, the facts set forth above clearly demonstrate that review is inappropriate. Patel has not pointed to any action of the district court or the Ninth Circuit which

departs from the accepted course of judicial proceedings. To the contrary, dismissal by the district court was to be expected in light of Patel's persistent refusal to comply with discovery rules and the district court's prior discovery order. Moreover, as shown hereinafter, the facts before the district court indicated that Patel was fully capable of compliance but refused or neglected to do so and thus dismissal was just. Therefore, there is no question before this Court which is appropriate for review on writ of certiorari.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING PATEL'S COMPLAINT.

The sanctions available to a district court pursuant to Rule 37 are discretionary, and the imposition of such sanctions should not be overturned unless the district court clearly abused its discretion. National Hockey League v.

Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 rehearing denied, 429 U.S. 874 (1976); Sigliano v. Mendoza, 642 F.2d 309 (9th Cir. 1981). The discretion to determine appropriate sanctions should not be disturbed unless the reviewing court has a "'definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'" Anderson v. Air West, Inc., 542 F.2d 522, 524 (9th Cir. 1976) (quoting In re Josephson, 218 F.2d 174, 182 (1st Cir. 1954). Findings of fact made in connection with a motion for sanctions for abuse of the discovery process, such as those issued by the district court in this case, should not be overturned unless clearly erroneous. Wyle v. R. J. Reynolds Industries, Inc., 709 F.2d 585 (9th Cir. 1983).

In his petition for certiorari, Patel appears to posit two arguments which he claims demonstrate abuse of discretion by the district court

in dismissing the complaint: (1) the dismissal was not just because it was "punitive" and (2) the order violated due process because the district court failed to take into account the circumstances surrounding the inability of Patel and his counsel to respond to the disputed discovery and to submit opposition or attend the hearing on the motion to dismiss. Neither of these arguments has merit.

A. The Order of Dismissal was Justified.

Federal Rule of Civil Procedure 37(d) provides that, if a party or the party's agent fails to appear for deposition, serve responses to interrogatories or respond to requests for production of documents, the court may impose sanctions "as are just" pursuant to Rule 37(b)(2), including dismissal of all or part of the action and imposition of attorney's fees.

It is well settled that pursuant to Rule 37, failure to comply with discovery rules subjects a litigant to the full range of the available sanctions, including dismissal of a complaint. See National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 at 642 (district court did not abuse its discretion by dismissing antitrust action for counsel's failure to respond to written interrogatories); Sigliano v. Mendoza, 642 F.2d 309, 310 (9th Cir. 1981) (dismissal of civil rights action for failure to answer interrogatories and request for production of documents affirmed); United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365 (9th Cir. 1980).

In Sumitomo Marine, the Ninth Circuit upheld the trial court's sanctions against the government and its attorneys for failure to obey

discovery orders.[2/] In so doing, the court stated that the three general purposes served by Rule 37 sanctions are to

> [e]nsure that a party will not be able to profit from its own failure to comply . . . Rule 37 strictures are also specific deterrents and, like civil contempt, they seek to secure compliance with the particular order at hand. Finally, although the most drastic sanctions may not be imposed as 'mere penalties,' . . . courts are free to consider the general deterrent effect their orders may have on the instant case and on other litigation, provided that the party on whom they are imposed is, in some sense, at fault. (Citations omitted.)

Id. at 1369, quoting, Cine Forty-Second St. Theatre Corp. v. Allied Artists Picture Corp., 602 F.2d 1062, 1066 (2d Cir. 1979).

It is also well-settled that a district court's dismissal of a complaint under Rule 37(d) is ap-

---

[2/] Whether the failure to comply pertains to a discovery rule or court order is immaterial. See Sigliano v. Mendoza, 642 F.2d 309, 310 ("[d]ismissal is a proper sanction under Rule

(footnote continued on next page)

propriate, where, as in the instant case, Patel or his counsel have exhibited willful failure to obey or flagrant disregard of the discovery rules, the local rules of court or a court's previous discovery order. See Sigliano v. Mendoza, 642 F.2d 309 (9th Cir. 1981).[3/]

In National Hockey League v. Metropolitan Hockey Club, Inc., this Court encouraged use of the sanction of outright dismissal for abuse of the discovery process. The appellate court had determined that a district court had abused its discretion by dismissing a complaint for counsel's repeated failure to respond to in-

---

(footnote continued from previous page)
37(d) for a serious or total failure to respond to discovery even without a prior order"). In the instant case, of course, Patel and his counsel disregarded both rule and order.

3/ Courts additionally have the inherent power to dismiss an action when a party has engaged in conduct "utterly inconsistent" with the orderly administration of justice. Wyle v. R.J. Reynolds Industries, Inc., 709 F.2d 585, 589 (9th Cir. 1983).

terrogatories. In reversing the appellate decision and upholding the district court's dismissal, the Court recognized the "natural tendency" of reviewing courts to shrink from the sanction of outright dismissal in spite of an adequate record to support that sanction. 427 U.S. 639, at 642. Nonetheless, the Court emphasized the value of the sanction of dismissal in appropriate cases as a deterrent "to . . . those who might be tempted to such conduct in the absence of such a deterrent." Id. at 643.

The record is replete with evidence that Patel, through his counsel, repeatedly failed to answer interrogatories and requests for documents, despite persistent requests from Flying Tiger and a clear warning from the district court that discovery abuse would meet with harsh sanctions.

Dismissal was particularly warranted in this case. It was a necessary and appropriate

sanction for Patel's repeated, willful frustration of Flying Tiger's discovery efforts and Patel's counsel's serious, if not total disregard of the court's rules. Both the district court and Flying Tiger's counsel had demonstrated utmost patience. Liberal extensions of time to respond to discovery requests were granted and the lower court permitted the case to proceed after Patel had seriously interfered with earlier discovery efforts. Lesser sanctions proved ineffective.

The district court's findings of fact in this case reflect that the court properly considered the full panoply of circumstances in determining whether to dismiss for failure to comply with discovery rules and orders. See National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 at 641-42. Patel did not file objections to any of those findings. They demonstrate that the district court considered the prior misconduct of Patel and his counsel in failing to

respond to earlier discovery requests, the conduct (or lack thereof) that was the subject of the motion, and the obvious ineffectiveness of lesser sanctions to deter Patel and his counsel's flagrant disregard of the discovery rules. The district court's order was not a "mere penalty" nor did it result solely from Patel's counsel's failure to appear at the hearing or to file an opposition to the motion to dismiss, although those events, indeed, added to an already inexcusable dearth of cooperation and diligence on the part of Patel and his counsel. The order of dismissal, therefore, was unquestionably "just."

B. Dismissal of the Complaint Did Not Violate Due Process.

Patel contends that the dismissal order violated due process because any noncompliance with discovery rules, local rules or the court's order was purportedly due to circumstances

beyond the control of Patel and his counsel. He also claims to have complied with the discovery requests. Patel asserts that upon informing the district court of purported exculpatory facts in his motion for new trial or relief from judgment, the district court should have reinstated the action.

Patel did not expressly indicate the basis for his Rule 60 motion for relief from the judgment. Based upon his motion papers, however, he apparently attempted to rely upon Rule 60(b)(1) -- "mistake, inadvertence, surprise, or excusable neglect," or 60(b)(6) -- "any other reason justifying relief from the operation of the judgment." Regardless of the basis for his motion, however, Patel did not show any reason entitling him to relief from the judgment, nor could he on remand of this action.

Whether a movant makes a sufficient showing of circumstances warranting relief under

Rule 60(b) is clearly a matter of discretion for the trial court, and its decision will not be overturned absent clear abuse of that discretion. See, e.g., Bennett v. Federal Deposit Ins. Corp., 396 F.2d 909, 911 (9th Cir. 1968); Smith v. Stone, 308 F.2d 15, 17-18 (9th Cir. 1962).[4/] In cases such as this one, where dismissal has been entered because of a litigant's failure to comply with discovery rules, local rules or court orders, numerous courts have denied Rule 60(b) relief in recognition of the fact that imposing the sanction of dismissal is necessary in order to achieve such compliance. See, e.g., In Re Visioneering Construction, 661 F.2d 119 (9th Cir. 1981).

[4/] Review of Rule 59 motions are subject to the same "abuse of discretion" standard of review. Should this Court, for some reason, find Patel's Rule 59 motion is timely or otherwise subject to review, it should nonetheless find that the district court did not abuse its discretion in

(footnote continued on next page)

Although courts have recognized due process limitations on a court's discretion to dismiss an action pursuant to Rule 37, limits on that discretion have been imposed only when the circumstances clearly indicate that the failure to comply was not wilful and that plaintiff or counsel was simply not able to comply. See, e.g., Societe Internationale v. Rogers, 357 U.S. 197 (1958) (dismissal violated due process where plaintiff exhibited good faith effort to comply with production order, but could not fully comply without violating pertinent foreign banking law). Patel and his counsel are not cloaked in such innocence. The record fully supports the district court's finding that the failure to re-

---

(footnote continued from previous page)
denying the motion, based on the contentions set forth above concerning Patel's Rule 60(b) motion.

spond to discovery requests was repeated and willful.[5/]

[5/] In each of the cases cited in which dismissal was warranted for noncompliance with discovery rules or orders, it is virtually a universal fact that the attorney, and not the litigant, was responsible for the failure to comply. The general rule is succinctly stated in Link v. Wabash Railroad Co., 370 U.S. 626, reh. den., 371 U.S. 873 (1962) (dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure proper for attorney's failure to attend pretrial conference):

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent.

Id. at 633-34.

The Link Court noted that a plaintiff is not without remedy if his attorney's conduct falls substantially below what is reasonable -- he can sue for malpractice. The court found no justification for "keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney." The result would be "visiting the sins of Plaintiff's lawyer upon the defendant." Id. at 634 n. 10 (emphasis in original).

(footnote continued on next page)

Specifically, Patel complains that the district court ignored the circumstances which prevented completion of written opposition to the motion to dismiss and which purportedly prevented his attendance at the hearing on the motion. Patel asserts that his inability to respond to the motion was proximately caused by Hurricane Alicia, which damaged his office and resulted in some loss of electrical power. The district court properly found this explanation disingenuous. In his declaration, Mr. Lopez concedes that Hurricane Alicia reached Houston, Texas, on August 18, 1983, yet Patel's opposi-

---

(footnote continued from previous page)
Furthermore, in the instant case, in light of Patel's own failure to attend his deposition without court intervention and his counsel's assertions that his client was difficult to contact, it cannot be said that Patel himself is without blame for the stonewalling of Flying Tiger's discovery efforts. Nor should the exigencies of Patel's occupation as a pilot or the geographical location of his freely-chosen attorney excuse the obstruction of discovery and the impermissible prejudice to Flying Tiger's preparation and defense of this action which such conduct inevitably brings.

tion papers were required to have been filed on August 4, 1983, some fourteen days before Hurricane Alicia struck Houston. See Fed R. Civ. P.6(e); Local Rule 7.6 of the Central District. The storm could not have interfered with Patel's counsel's failure to file an opposition to the motion. With that failure, Patel and his counsel forfeited any right to be heard at the hearing on the motion and the district court was fully entitled to construe such failure to file opposition as Patel's consent to the granting of the motion to dismiss. Such conduct is particularly egregious in light of the fact that the district court had chastised Patel, through his local counsel, for failing to file timely opposition to Flying Tiger's first motion to dismiss.

Furthermore, the record demonstrates that neither of Patel's counsel were prevented from attending the hearing because of Hurricane Alicia; Mr. Lopez had another court commitment in Houston, Texas, and Mr. Steiner's (Patel's

local counsel) office is located in Los Angeles, California. Finally, Patel's own papers show that counsel failed to warn the district court of their inability to appear at the hearing, despite the fact that they became aware of their problems while telephone service or other means of communication were still operable.

In Smith v. Stone, 308 F.2d 15 (9th Cir. 1962) a case similar to this one, the Ninth Circuit upheld the district court's denial of Rule 60(b) relief from a summary judgment order entered against plaintiff after he or his counsel failed to file opposition papers to defendants' motion. The day before the hearing, plaintiff's counsel contacted defendants' counsel to indicate his intention to seek a continuance of the hearing; a colleague requested the continuance, without success. The Ninth Circuit found that there was no inadvertence or excusable neglect, and that plaintiff's failure to file opposition papers in conformance with local rules forfeited his

right to oral argument at hearing. The appellate court also rejected plaintiff's counsel's affidavit listing his illness, secretarial trouble, and conflict with other court appearances as well as his claim that the case should be decided on the merits since it was "important." In so doing, the Ninth Circuit stated that "[c]ounsel for litigants, no matter how 'important' their cases are, cannot themselves decide when they wish to appear, or when they will file those papers required in a law suit. Chaos would result." Id. at 18.

In what can only be construed as a belated opposition to Flying Tigers' motion to dismiss, Patel asserted that he had fully responded to Flying Tigers' discovery requests by the time Flying Tiger's motion to dismiss was served. This is not the case, and the record fully supports the district court's finding of fact that discovery was not complete. Indeed, only after the filing of the dismissal motion and long past

the due date of the discovery did Fiying Tiger receive any response whatsoever to its outstanding interrogatories, yet even this response (a terse, one page letter) was woefully inadequate under the federal discovery rules, and Patel's counsel was so advised by a letter from Flying Tiger's counsel. Moreover, the district court was justified if it chose to ignore the belated offers of information. As demonstrated in Wyle v. R. J. Reynolds Industries, Inc., 709 F.2d 585, 591 (9th Cir. 1983), last minute tenders of discovery, in the face of a motion to dismiss, will not rectify prior abuse of the discovery rules and court orders. See also G-K Properties v. Redevelopment Agency, 577 F.2d 645, at 647 (district court's denial of plaintiff's tender of disputed documents at hearing on motion to dismiss proper). As the Ninth Circuit noted in G-K Properties, to permit such eleventh-hour tender would make a mockery of the discovery rules:

> The district court found that an additional continuance of the trial date would not be an effective sanction, and that to impose a fine would merely 'introduce into litigation a sporting chance theory encouraging parties to withhold vital information from the other side with the hope that the withholding may not be discovered and, if so, that it would only result in a fine.' Accordingly, the court dismissed the case to protect the integrity of its orders.

Id. at 647.

In this case, Patel has failed to show "mistake, inadvertence, surprise or excusable neglect" or "any other reason justifying relief from the operation of the judgment."

No factual or legal grounds exist for granting relief from the judgment dismissing this action, and Patel's Rule 60(b) motion was properly denied.

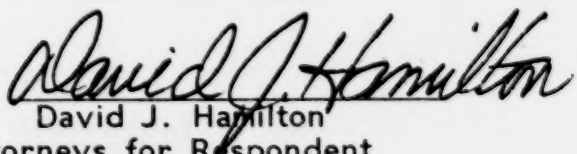
CONCLUSION

For the foregoing reasons, the Ninth Circuit's affirmance of the district court's order of dismissal was appropriate, the petition for certiorari should be denied, and the cost of preparing this response, including reasonable attorneys' fees, should be awarded to Flying Tiger.

DATED: October __, 1985.

Respectfully submitted,

O'MELVENY & MYERS
DAVID J. HAMILTON

By 
David J. Hamilton
Attorneys for Respondent

APPENDIX

Parent of Respondent

Tiger International, Inc.

Subsidiaries of Respondent

A. Flying Tiger Air Services, Inc.

B. Skyvoyager, Inc.

C. SWAP, Inc.

D. Tiger Trading Company

E. Tiger InterModal, Inc. (includes Tiger Distribution Services)

Affiliates of Respondent

A. The Flying Tiger Corporation

B. Hall's Motor Transit Company

    1. Terminal Rental, Inc.

    2. Susquehanna Equipment Corporation

C. TIG, Inc.

1. Tigro, Inc.

a. Tiger Affiliates, Inc.

D. Tiger International, Inc.

1. Tiger International Insurance Limited

E. Tiger Leasing Group, Inc.

1. NAC Railcar Investors, Inc.

2. National Equipment Rental, Ltd.

a. TigerAir, Inc.

i. Permez Holding B.V.

A. Aviquipo N.V.

ii. Maple Leaf Leasing Limited

iii. NAL-One, Ltd.

iv. WEF Manufacturing, Inc.

v. TigerAir Service Center, Inc.

b. Tiger Europe Investors Corporation

c. Tiger Leasing Deutschland GmbH

d. Tiger Leasing, S.A.

e. Tiger Leasing Spain S.A.

f. Tiger Leasing Sweden A.B.

g. Etchgrand, Ltd. (formerly, Tiger Leasing (UK) Limited)

3. North American Car Corporation

a. The Bi-Modal Corporation

i. Road-Rail Transportation Company, Inc.

b. California Tank Car Line, Inc.

i. Equipo Nacional de Arrendamiento, S.A.

c. NAACO, S.A.

i. Societe de Transports Par Le Rail (Legally known as "Trans-Rail, S.A.")

A. NAACO & Compagnie S.N.C.

d. North American Car (Canada) Limited

i. North American Car Repair Limited (Legally known as "120061 Canada Limited")

e. P & R Railcar Service Corp.

f. S.T.I. of Kansas, Inc.

g. Surface Transportation International, Inc.

i. Air and Surface Transportation International, Inc.

ii. STI of Louisiana, Inc.

iii. Surface Transportation of Ohio, Inc.

iv. S.T.I. of South Dakota, Inc.

v. S.T.I. Special Services, Inc.

vi. S.T.I. of Wisconsin, Inc.

vii. S.T.I.X. Car Leasing Incorporated

h. Texas Railway Car Corporation

i. Tiger Financial Services, Inc.

A. Tiger Marine, Inc.

j. TESL Realisations (No. 2) Limited

A. Flying Tigers, Ltd.

4. Pegasus, Inc.

a. SEDEPA, S.A. de C.A.

i. Grupo Tiger, S.A.

A. Bienes Inmuebles Tiger S.A. de C.V.

B. Endasa, S.A. de C.V.

C. Tiger Administradora, S.A. de C.V.

D. Tiger Arrendadora, S.A. de C.V.

E. Endasa, Inc.

5. Tiger Equipment & Services, Ltd.

a. Tiger Equipment & Services, N.V.

b. Tiger Equipos, S.A. de C.V.

6. Tiger Leasing Ltd.

7. Tiger Equipamientos y Servicios, S.A.

8. TLG do Brasil, S.A.

F. Tiger Trucking Subsidiary, Inc.

1. Warren Transport, Inc.